

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TITAN INVESTMENT FUND II, LP)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-10-259 WCC
)	
FREEDOM MORTGAGE)	
CORPORATION,)	
)	
Defendant.)	

Submitted: November 22, 2011
Decided: March 27, 2012

FINDINGS OF FACT - CONCLUSIONS OF LAW

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CARPENTER, J.

I. Introduction

The defendant in this case, Freedom Mortgage Corporation (“Freedom”), is a 23-year-old mortgage financing company with seven hundred employees headed by Stan Middleman, Freedom’s president, CEO, and sole shareholder. The plaintiff is the Titan Investment Fund II, LP (“Titan”), a subsidiary fund of the Titan Capital Investment Group (“TCIG”), a Pennsylvania-based partnership that primarily manages real estate investments of various kinds. In early 2009, Titan and Freedom met to discuss a warehouse fund that could help Freedom address the challenges of maintaining a mortgage lending business in the wake of the credit crisis that had begun in 2008. The parties contemplated a fund as large as \$100 million but agreed that Titan would begin by finding investors who were willing to commit to an initial investment of \$25 million. The initial agreement was set forth in a Term Sheet and Letter Agreement executed by the parties in April 2009. After several months of due diligence and efforts to find investors amid a rapidly changing economic environment, the deal finally collapsed on August 4, 2009, when Freedom’s lawyers sent Titan a letter notifying them that the commitment letters provided by Titan for the first \$25 million were not satisfactory and, therefore, that Freedom was terminating the deal. This litigation followed.

II. The Players

Freedom is a mortgage financing company that handles residential mortgage financing for consumers who are buying new property or who are refinancing an existing mortgage. As a mortgage bank, Freedom has no reserves of cash from customer deposits upon which it can draw to make its loans. Instead, Freedom relies on lines of credit from institutional lenders like J.P. Morgan to provide the necessary capital for its business. Freedom earns its profits from fees charged to consumers on the loans it originates and from the sale of the loans to third parties.

Titan is a subsidiary fund of the Titan Capital Investment Group. TCIG is a Pennsylvania-based partnership that manages various real estate investments. When the TCIG team makes an investment, they create a subsidiary fund under the umbrella of TCIG to manage the specific investment. TCIG created Titan in February 2009 as a subsidiary fund under the TCIG umbrella to effectuate the Freedom investment. TCIG is owned by William Peruzzi, Scott Budinsky, and John Giangliulo. The three partners serve as the day-to-day managers for TCIG and its subsidiary funds, including Titan.

Context Capital Partners (“Context”) is an investment firm owned by Ronald Biscardi and Eric Brooks. Biscardi manages Context on a day-to-day basis and Brooks, a highly successful poker player and an ultra-high net worth

individual, provides capital for Context's investments. TCIG has maintained a close business relationship with Context and the two companies have worked together on numerous prior transactions. When Context makes an investment in a fund managed by TCIG, Context usually assumes general partner responsibilities in the fund, while Brooks or other investors serve as limited partners. In the Titan-Freedom deal, Context agreed to invest \$5 million dollars to serve as the co-general partner with Titan on a fifty-fifty basis. TCIG planned to manage the fund and administer the investment vehicle, but it did not expect to invest directly in the transaction.

LBC Credit Partners, Inc. ("LBC") is a middle market financing company with offices in Philadelphia, New York, and Chicago. LBC agreed to commit \$20 million to the Freedom investment. The extent and nature of LBC's commitment was noted by Freedom in its decision to abandon the deal.

_____ III. Initial Negotiations (January to April 2009)

Like many a doomed courtship, the story of Titan and Freedom began at a party. In December 2008, Stan Middleman of Freedom and Bill Peruzzi of Titan met at a mutual friend's Christmas party. At the party, the two businessmen discussed the state of the economy and the possibility of doing business together

in the future. They agreed to meet again in January to develop ideas and details regarding a joint transaction.

Middleman met Peruzzi and his partners for lunch in mid-January 2009. At that time, Middleman explained that the recent changes in the banking industry had significantly reduced the amount of liquidity available for mortgage loans. At the same time, reduced consumer interest rates had significantly increased demand for new mortgages and for the refinancing of existing mortgages. These competing pressures created a challenge for Freedom. The corporation stood to gain a competitive advantage if it had easy access to capital to service the mortgage business, but their ability to do so was becoming particularly difficult due to banks withdrawing from the market. To further complicate matters, Middleman and other executives at Freedom harbored doubts about whether their existing agreement with J.P. Morgan, a major source of liquidity for Freedom, would be renewed at the conclusion of its term.

Middleman thus proposed to Peruzzi a new warehouse fund, managed by Titan, combining mortgages and servicing income. Middleman initially estimated that he would need a fund of about \$100 to \$150 million to accomplish his goals. Titan expressed interest in the proposal but indicated that it would need a return rate of about 20% to attract investors. In a follow-up e-mail dated January 20,

2009, Middleman expressed confidence that he would be able to achieve their return objectives through a combination of interest rate and participation in servicing income cash flow.¹ About a week later, Giangiulio sent an e-mail to his partners at Titan outlining what additional information Titan would need about Freedom and the proposed deal to prepare an executive summary that could be used to pitch the deal to Context and other potential investors.²

On February 2, 2009, Peruzzi sent a proposed write-up of the deal to Middleman. Middleman called the document a “great start,” and affirmed that “the numbers do generally work for me,” and proposed a sub-debt cost of funds of 14% per year.³ To assist Titan with structuring the deal, Middleman sent Titan a specimen Term Sheet based on two-thirds warehouse debt and one-third unsecured debt on February 13, 2009.⁴ Peruzzi testified at trial that he and Giangiulio used the specimen Term Sheet as a skeleton to build the actual Term Sheet that was signed in April.⁵

From the Court’s perspective these early months of negotiations revealed that Titan was exploring a business that they had no expertise or experience in and, at the same time, Freedom was desperately looking for alternative funding to

¹ Ex. 359.

² Ex. 2.

³ Ex. 4.

⁴ Ex. 7.

⁵ Trial Tr., Feb. 23, 2011, AM Session, 125-126.

avoid a potential crisis for the company. This resulted in a misunderstanding of the significance of certain documents, a lack of appreciation for practices of the industry, and a business relationship marked by significant mistakes, misjudgments, and informality. In other words, Titan and Freedom's relationship was based on faulty foundations from its very beginning. However, the symbiotic forces of money on one side and desperation on the other propelled the deal forward.

IV. The Term Sheet and Letter Agreement

Titan and Freedom executed a Term Sheet on April 9, 2009.⁶ The Term Sheet provided for an initial facility in the amount of \$25 million and permitted Freedom to use up to 100% of the facility to fund loans.⁷ The parties also signed a Letter Agreement at the same time that the Term Sheet was executed.⁸ The Letter Agreement provided that Freedom had thereby engaged Titan to raise sufficient funds to provide a warehouse credit facility to Freedom, subject to the following conditions: (1) that the loan documents and commitment letters were "mutually acceptable" to both Titan and Freedom; (2) that Titan had determined that there was no material adverse change in Freedom's business or in the marketplace more

⁶ Ex. 35.

⁷ *Id.*

⁸ *Id.*

generally; and (3) that Titan successfully completed its due diligence review of Freedom.⁹ Under the terms of the Letter Agreement, Titan had 90 days to obtain written and binding investor commitments for the initial \$25 million investment. Freedom was permitted to continue to seek financing through other lenders, but it was also required to disclose the terms of other potential deals to Titan and was not relieved of its obligation to borrow from Titan by a deal with any other lender.¹⁰

Testimony revealed that it is not a standard practice in the mortgage banking industry to include a binding letter agreement with a term sheet before a transaction has closed, though cover letters accompanying and describing a term sheet are not uncommon.¹¹ As such, the parties' views as to the significance of the document varied. Peruzzi testified at trial that he understood the Letter Agreement to create a binding obligation on Titan to use best efforts to raise the initial \$25 million needed for the facility and an obligation on Freedom to borrow the \$25 million if Titan fulfilled the conditions set forth in the Letter Agreement.¹² However, Middleman appears to have viewed the Letter Agreement and Term Sheet quite differently. At trial, Middleman testified that he had understood the

⁹ *Id.*

¹⁰ *Id.*

¹¹ Trial Tr., Feb. 21, 2011, PM Session, 8.

¹² Trial Tr., Feb. 23, 2011, PM Session, 12-14.

Letter Agreement to be nothing more than a cover letter describing the accompanying Term Sheet and did not believe it to impose any obligation on Freedom to complete the loan transaction unless he was satisfied that the deal was acceptable in both form and substance.¹³

V. From Term Sheet to Commitment Letters (April to July 2009)

a. Titan Conducts Due Diligence and Solicits Investors

Titan needed to complete substantial due diligence on Freedom's business to solicit investors. Peruzzi testified that this was because potential investors wanted Titan to conduct an especially thorough investigation of Freedom given the challenging economic environment and the troubled state of the mortgage banking industry.¹⁴ However, scheduling conflicts delayed the due diligence process. Titan tried to send reviewers to Freedom's offices in the last week of June, but those efforts were deferred, ostensibly because of conflicts in vacation schedules.¹⁵ At trial, Middleman admitted that he blocked Titan from performing on-site due diligence that week because Freedom was hosting due diligence review from another potential lender.¹⁶

¹³ Trial Tr., Feb. 21, 2011, PM Session, 5, 12.

¹⁴ Trial Tr., Feb. 23, 2011, 16-18.

¹⁵ Trial Tr., Feb. 22, 2011, AM Session, 9-12.

¹⁶ *Id.*

Despite these challenges, Titan found two investors for its deal with Freedom. One investor was Context: Context's Eric Brooks and his partner Andy Frost each agreed to contribute \$2.5 million to the fund for a total of \$5 million. The other investor was LBC, which invested the remaining \$20 million needed to raise the initial \$25 million. On June 17, 2009, Titan and LBC signed a draft agreement outlining the terms and conditions under which LBC would invest in the fund.

b. Changing Economic Conditions

_____The economic environment evolved rapidly as Titan conducted due diligence and negotiated lender commitments. The credit markets began to thaw, giving Freedom greater access to liquidity, and at a lower rate of interest, than it had in January 2009. Furthermore, consumer interest in making and refinancing mortgage loans declined from its peak at the beginning of the year. In early June, Middleman sent an e-mail to Titan expressing doubts about the continued viability of the transaction, noting, “[W]e may have missed the bus on the high rate warehouse need. Speed to market is part of the deal, why take on the big debt service without the need.”¹⁷ At trial, Middleman acknowledged that the economic circumstances had changed in Freedom's favor since the beginning of the year and

¹⁷ Ex. 376.

admitted that he saw the changing economic conditions as potentially undermining the economic basis for the deal.¹⁸ However, Middleman also testified that he sent that e-mail to push Titan to get the deal done soon.¹⁹

Around June 24, 2009, Middleman told Titan that he wanted to decrease the size of the facility from \$100 million to \$60 million on account of the increased availability of credit in the market.²⁰ Middleman also told Titan that he had received several term sheets from other lenders with terms more favorable to Freedom than those in the Titan deal.²¹

On June 29 the parties agreed to extend the deadline for Titan to provide commitment letters to July 24 because of the due diligence issues. Middleman continued to express doubts about the viability of the deal with Titan, and the management at Titan and Context were becoming increasingly concerned that Freedom would walk away from the deal. On July 2, Middleman told Titan that he was having “very aggressive” conversations about real bank rate financing that could impact Freedom’s deal with Titan.²² Middleman added that he wanted to make sure that the deal would be a good value for Freedom in order to see the deal

¹⁸ Trial Tr., Feb. 21, 2011, PM Session, 82.

¹⁹ *Id.* at 71.

²⁰ Ex. 187.

²¹ *Id.*

²² Ex. 100.

through.²³ On the other side, Titan was being pushed by Context to complete the deal because of the significant return they could receive from the investment.

VI. The Deal Collapses (July to August 2009)

a. Middleman's E-mail (July 22, 2009)

Commitment letters were due in the final week of July. On July 20, Middleman e-mailed Titan asking if he could expect a draft of the loan agreement in the near future.²⁴ In response, Titan sent an initial draft of the repurchase agreement to Middleman on July 21.²⁵ Titan told Middleman that they tried to craft their deal around the J.P. Morgan repurchase document Freedom had provided.²⁶ Middleman gave the document a “cursory review” on the night of July 21 and found the document inconsistent with his expectations for the deal with Titan.²⁷ He had expected a much simpler document which would provide greater flexibility for his business.²⁸

On July 22, Middleman responded to Titan's e-mail containing the draft agreement, writing, “I have spent a great deal of time trying to justify this [transaction] in my mind (I would like to) and can't seem to make it work for us,

²³ *Id.*

²⁴ Ex. 112.

²⁵ Ex. 66.

²⁶ *Id.*

²⁷ Trial Tr., Feb. 22, 2011, 17.

²⁸ *Id.*

the cost is just too high. Therefore, I have instructed my staff to put this project on hold and to do no more work on the subject.”²⁹ Middleman also noted that the economy had changed. He wrote that the transaction “was based on an extraordinary event whose time may well have passed” and that the parties “were not able to get this [deal] done quickly enough to take advantage of a short-lived refinance boom that seemingly has run out of steam.”³⁰ Middleman acknowledged that Titan had invested a great deal of time and effort into the transaction and offered to reimburse Titan for its third-party costs.³¹ Middleman did not tell Titan that Freedom was in the midst of negotiating credit lines from Deutsche Bank and Texas Capital Bank.³²

Panicked by Middleman’s apparent repudiation of the deal, Peruzzi left a voicemail for Middleman on July 22 asking to discuss the deal. Peruzzi said he was “puzzled” by Middleman’s response to the repurchase agreement and pointed out that the agreement Titan had sent was essentially similar to the J.P. Morgan repurchase agreement Freedom had given Titan to work off of.³³ Peruzzi assured Middleman that Titan would continue to work diligently to fulfill the terms of the

²⁹ Ex. 70.

³⁰ *Id.*

³¹ Ex. 70, *See also* Trial Tr., Feb. 28, 2011, AM Session, 46 (Biscardi testifying that he and Peruzzi estimated third-party costs were around \$100,000 to \$200,000).

³² Trial Tr., Feb. 22, 2011, 32.

³³ Trial Tr., Feb. 23, 2011, PM Session, 23.

Term Sheet and would send investor commitments to Middleman by the end of the week as originally agreed.³⁴

b. Titan Issues Commitment Letters (July 24, 2009)

Titan had its investor commitments in place by late July. On July 23, 2009, Brooks agreed to invest \$2.5 million in the Titan fund contingent on Frost agreeing to invest the same amount.³⁵ LBC committed to participate in the fund as a co-buyer. The loan would be documented in substantially the form of the draft Titan sent to Freedom on July 22, but subject to changes requested or approved by LBC. Biscardi had concerns with the form of LBC's commitment letter and it underwent substantial revision before Titan submitted a final version on July 24. For example, the parties deleted a provision that would have given LBC the opportunity to conduct further due diligence and to walk away from the transaction if LBC was not satisfied with due diligence findings. The president of LBC testified that he considered the letter a commitment by LBC to invest \$20 million in Titan's fund and that LBC was not free to abandon the transaction after it issued its commitment letter.³⁶

³⁴ Trial Tr., Feb. 23, 2011, PM Session, 25.

³⁵ Ex.296.

³⁶ Homyar Choksi Dep. 90: 8-16.

Titan forwarded the commitment letters to Freedom and told Freedom it would arrange a follow-up meeting to discuss the final loan documentation.³⁷ Middleman forwarded copies of the commitment letters to two of his executive officers, Brian Simon and Gerard DeVita.³⁸ Concerned that in spite of the commitment letters Freedom would maintain the position set forth in the July 22 e-mail, Titan requested a meeting for July 28 at Freedom's offices. At the meeting, Middleman again expressed concern about the deal, the use of the funds, the rate being charged, and whether he would be able to do the deal. He again offered to pay the expenses Titan had incurred in the transaction.³⁹

After the meeting, on July 29, Giangiulio called Middleman to tell him that Titan would not walk away from the deal unless Freedom paid the net present value of the deal.⁴⁰ On July 31, 2009, Titan sent a letter to Freedom notifying Freedom that Titan was prepared to close on the deal and seeking Freedom's comments on the proposed repurchase agreement.⁴¹ Middleman, surprised to have received a formal letter on letterhead, forwarded the letter to Simon and to Freedom's outside counsel. On August 3, Middleman informed Titan that the documents were "in review" and that he would be out of the country on vacation

³⁷ Ex. 382.

³⁸ Ex. 325.

³⁹ Trial Tr., Feb. 23, 2011, PM Session, 40.

⁴⁰ Ex. 186.

⁴¹ Ex. 136.

for the next two weeks.⁴² Giangiuolo answered, “[W]e are prepared to finish the balance of the ancillary documents to close this transaction. Please let us know who will be handling the matter in your absence and who your counsel will be for the transaction.”⁴³ In internal e-mails, Middleman and his colleagues expressed disbelief at Giangiuolo’s communication.⁴⁴

c. Freedom’s Lawyers Terminate the Deal (August 4, 2009)

The deal terminated on August 4, 2009. Freedom’s attorneys sent a letter to Titan announcing that the deal was terminated due to invalid commitment letters.⁴⁵ In particular, the letter emphasized that the LBC commitment letter was not a binding investor commitment as required by the Term Sheet.⁴⁶ The letter from Freedom’s counsel explained that the LBC commitment letter referred to a “proposed commitment,” that LBC’s commitment to invest in the fund was “expressly conditioned” upon several requirements, and that the commitment letter included a purported right to back out of the deal under certain circumstances.⁴⁷ Freedom’s counsel also communicated that its client had found major problems in the draft documentation provided for the loan agreement.⁴⁸ The letter from

⁴² Ex. 309.

⁴³ Ex. 310.

⁴⁴ *Id.*

⁴⁵ Ex. 79.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Freedom's counsel concluded that Titan's failure to provide the required investor commitment letters terminated the Letter Agreement.⁴⁹

VII. The Verdict

a. Enforceable Agreement

In spite of the legal arguments by the parties and the various issues they believe should be addressed, the Court believes this case comes down to one question:

Did Mr. Middleman, in July 2009, breach the terms of the Letter Agreement and Term Sheet executed by the parties by failing to continue to negotiate the Freedom-Titan deal in good faith?

To answer this question, it is important to first review what was required under the Letter Agreement. This Agreement, dated April 7, 2009, and signed by the CEOs/presidents of both Titan and Freedom, stated in pertinent part:

By this letter agreement, by and between Titan Investment Fund II, LP, or its designee ("Titan" or the "Lender"), and Freedom Mortgage Corporation ("Company" or the "Borrower"), the parties hereby acknowledge and agree the Borrower engages Titan to raise sufficient funds to provide a warehouse credit facility (the "Facility") to the Company for the purpose of warehousing conforming one-to-four family residential mortgage loans owned by Company that fully conform to all underwriting and other requirements of

⁴⁹ *Id.*

FNMA, FHLMC, FHA, GNMA, HUD, or VA and are fully documented pursuant to the respective agency guidelines. . . . The obligation of Titan to provide the Facility (as defined in the Term Sheet) is subject to the following: (i) Titan completing the raise of no less than \$25 million to fund the Facility; (ii) the preparation, execution and delivery of a credit agreement (the “Credit Agreement”), and other loan documents (collectively, together with the Credit Agreement, the “Loan Documents”) mutually acceptable to the Borrower and Lender; (iii) Lender’s determination, in its sole discretion reasonably applied, that there is no material adverse change in the business, condition (financial or otherwise), operations, performance, properties, or prospects of the Borrower; or, prior to closing, in the residential mortgage market’s regulatory and governmental oversight policies and procedures, mortgage buying programs at FNMA/FHLMC/FHA/GNMA/HUD/VA agencies or capital markets generally; and (v) any required Lender due diligence review of Borrower and its affiliates.⁵⁰

While not an agreement to borrow or lend money, this was an agreement that obligated Freedom to close on a warehouse facility if Titan obtained investor commitments for \$25 million, provided Titan’s loan documents were reasonably satisfactory in form and substance. After considering the trial testimony and reviewing this document, the Court finds the Letter Agreement an enforceable agreement that required the parties to act in good faith. And while the parties would have had to hurdle numerous legal obstacles to produce a final document

⁵⁰ Ex. 35.

that would definitively control the parties' relationship, this does not make the initial Letter Agreement unenforceable.

The Court also finds that Middleman's testimony regarding his perception of the significance of the Letter Agreement is simply unconvincing. Middleman is a sophisticated businessman who had knowledge far superior than Titan of the importance of such documents. While his financial predicament may have caused him to agree to terms he no longer believed to be in his interest, the Court refuses to believe he didn't read the Letter Agreement or that he executed it without appreciating its significance. This conclusion is similar to the finding by Chancellor Strine in *RGC International Investors, LDC v. Greka Energy Corp.*⁵¹ In that case and in this case, the Letter Agreement was detailed; it was negotiated under important commercial circumstances; and in all respects the document appeared to be a binding contract as to certain promises. Like the Chancellor in *RGC*, this Court has no difficulty concluding that the Letter Agreement gave rise to an enforceable obligation between Titan and Freedom.

b. The July 22 E-mail

Having found that the Letter Agreement is an enforceable, unambiguous agreement between the parties, the Court is now required to consider the effect of

⁵¹ 2001 WL 984689, at *13 (Del. Ch. Aug. 22, 2001).

the July 22, 2009 e-mail from Stan Middleman to Bill Peruzzi. The e-mail states:

Thanks for the document. I had the opportunity to review it in a somewhat cursory manner. Unfortunately it is twice as long as our existing Chase document. Your process has been thorough and impressed me greatly to the extent of detail and work you have done. As you know, I have had concerns through out the process concerning the price and process necessary to make the deal work. This transaction was based on an extraordinary event whose time may well have passed. We have come to expect future market pricing not far off from our existing deal to be available to us. I do not wish to spend any more time or money on this deal than we already have. The review of this document will be very expensive as will the changes and updates and I simply do not want to incur the cost on a deal that we may not consummate. Even with the safety net of down side volume protection, the margin reduction required to stimulate the volume necessary to make this deal work, does not seem to work for me. I have spent a great deal of time trying to justify this in my mind (I would like to) and can't seem to make it work for us, the cost is just too high. Therefore, I have instructed my staff to put this project on hold and to do no more work on the subject.

I appreciate the work you have done, and the possibility that our deal does not adequately address your sunk costs. Please assemble an accounting of your expenditure versus our deposit and I will be more than happy to make you whole for out of pocket third party costs beyond our deposit. Hopefully you will not resent us for the work put into this. I am sure that you appreciate the time and effort we have put forth in good faith as well. Speed to market was a driving force and we were not able to get this done quickly enough to take

advantage of a short lived refinance boom that seemingly has run out of steam.

We should stay in touch to take advantage of opportunities that may cross our paths. Please feel free to contact me at any time.⁵²

To understand this e-mail, it is perhaps important to note what had transpired in the four months between the e-mail and the Letter Agreement's execution. When the Letter Agreement was signed, the mortgage lending world was in turmoil, and it was unclear how the crisis would be managed. By the end of 2008, warehouse credit capacity had declined by 85% to 90% and several major banks who had been providing warehouse credit announced they were leaving the market. On the other hand, Freedom's business was booming due to record low interest rates and consumer interest in refinancing prior mortgages. Freedom, however, was concerned that they would be losing their main source of capital, J.P. Morgan, and this resulted in their pursuing alternative means of financing their operation. This led to the April 2009 Letter Agreement and Term Sheet establishing the warehouse credit facility.

Between April and July of 2009, Titan proceeded with its efforts to obtain investor commitments and to perform due diligence on Freedom to satisfy potential investors. However, at the same time, the mortgage business was

⁵² Ex. 70.

changing, and the threat Freedom faced of losing additional funding was diminishing. In fact, Freedom was approached by other financial institutions with funding offers significantly more favorable than Titan's. So while Freedom continued to be somewhat interested in continuing its relationship with Titan, Freedom no longer considered Titan its only savior in a disastrous situation. Instead, in June and July of 2009, Freedom considered the Titan deal another possible source of funding if it was ever needed. In simple terms, over the four-month period following the signing of the Letter Agreement, the lending landscape shifted and changed the economics of the deal. Middleman stated as much when he concluded "this transaction was based on an extraordinary event whose time may well have passed."⁵³

When this e-mail was transmitted, Middleman had not received the commitment documents that Freedom eventually used to legally justify ending the deal, and only the day before had he received the 134-page draft of the repurchase agreement. As such, this e-mail was not precipitated by a document or commitment concern but the realization that the deal simply did not make economic sense anymore.

⁵³ Ex. 70.

The Court believes there are only two reasonable conclusions that can be reached from this e-mail communication. Either (1) Middleman was posturing to get a different and more favorable deal and therefore lying about his true intentions, or (2) he was making a business decision to walk away from the deal that had been struck in April 2009. In either event, the Court finds that on July 22, 2009, Freedom stopped performing under the contract and had no intention of moving forward towards a final credit/loan document. The Court has no doubt that as of July 22, 2009, nothing short of a significant reworking of the Letter Agreement would have saved the Titan-Freedom deal from collapsing. As such, the Court finds that as of July 22, 2009, Freedom repudiated the contract when Middleman advised Titan that he was directing his staff to no longer work on the project and told Titan that Freedom would pay for Titan's out-of-pocket expenses.

“Under Delaware law repudiation is an outright refusal by a party to perform a contract or its conditions. . . . A statement not to perform unless terms different from the original contract are met also constitutes a repudiation.”⁵⁴

Therefore, under either conclusion above, Freedom repudiated the contract by the July 22 e-mail.

⁵⁴ *Citisteel USA, Inc. v. Connell Ltd. Partnership*, 758 A.2d 928, 931 (Del. 2000).

The defendant argues that even if the Court finds the July 22 e-mail to be a repudiation of the Letter Agreement, he retracted the repudiation by his agreement to continue to review the purchase agreement and by asking Titan to submit their commitments. This argument would perhaps have merit if the Court found that Freedom intended to do in good faith what was required under the Letter Agreement. The Court does not so find. Any perceived retraction of the July 22 decision was a business ploy to string Titan along until a legal path out of the Letter Agreement could be determined.⁵⁵ Freedom had alternative funding from Texas Capital Bank and had no interest in continuing with the Titan deal.⁵⁶ To be effective a retraction must be clear and unequivocal and must place the other party on notice of one's intent to comply with the contract in spite of their earlier statements or conduct.⁵⁷ If the retraction is not done in good faith and made merely to gain time or to develop an excuse for non-performance, it will not be considered valid. And even if there was a question concerning the finality of the July 22 decision, it was removed by Freedom's reaffirming of its decision in the subsequent meeting on July 29.

⁵⁵ See Ex. 305 (e-mail by Middleman stating "I am going to probably pass on the deal but string them out for a little while in case we become desperate").

⁵⁶ See Ex. 313, 329 (evincing Texas Capital Bank's approval of a loan for Freedom).

⁵⁷ *Carteret Bancorp, Inc. v. Home Group, Inc.*, 13 Del. J. Corp. L. 1115, 1124-26 (Del. Ch. Jan. 13, 1988).

The Court reaches this conclusion in spite of the fact that, to a large degree, Freedom held the keys to get out of the deal. The final loan agreement document had to be acceptable to Freedom and it would not have been difficult to argue that the document Titan provided was not the one contemplated by the parties when they executed the Letter Agreement. However, the fact that Freedom might not have accepted the final financing document did not give Freedom the right to breach the agreement meant to get the parties to that point in the deal. In every contractual relationship there is an obligation for the parties to act with good faith towards accomplishing the terms of their agreement. In Middleman's case, to get out of his bad deal he foolishly breached that obligation.

c. Damages

While the Court's concern regarding the probable conclusion of the Titan-Freedom deal does not prevent a finding of a breach, it does affect the Court's calculations of appropriate damages.

The remedy for breach of a contract is based upon the reasonable expectations of the parties *ex ante*.⁵⁸ A proper damage award is an amount sufficient to restore the injured party to the position they would have been in but for the breach.⁵⁹ Delaware courts have consistently held that there can be no

⁵⁸ *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).

⁵⁹ *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000).

recovery for lost profits when they are determined to be “uncertain, contingent, conjectural or speculative.”⁶⁰ And while the law does not require that the plaintiff establish damages to a mathematical precision, it does require that there be a sufficient evidentiary basis to determine a fair and reasonable estimate of damages.⁶¹

The issue of determining damages in a case like this was perhaps best clarified by Chief Judge Posner of the U.S. Court of Appeals for the Seventh Circuit. When grappling with the damages implications of a breach of an express obligation to renegotiate in good faith in *Venture Associates Corp. v. Zenith Data Systems Corp.*, he wrote:

Damages for breach of an agreement to negotiate may be, although they are unlikely to be, the same as the damages for breach of the final contract that the parties would have signed had it not been for the defendant’s bad faith. If, quite apart from any bad faith, the negotiations would have broken down, the party led on by the other party’s bad faith to persist in futile negotiations can recover only his reliance damages—the expenses he incurred by being misled, in violation of the parties’ agreement to negotiate in good faith, into continuing to negotiate futilely. But if the plaintiff can prove that had it not been for the defendant’s bad faith the parties would have made a final contract, then the loss of the benefit of the contract is a consequence of the defendant’s bad faith, and, provided that it is a foreseeable consequence, the defendant is liable for that loss—liable, that is, for the plaintiff’s consequential damages.⁶²

⁶⁰ *Pharmathene, Inc. v. SIGA Technologies, Inc.*, 2011 WL 6392906, at *3 (Del. Ch. Dec. 16, 2011).

⁶¹ *Pharmathene, Inc. v. Siga Technologies, Inc.*, 2011 WL 4390726, at *31 (Del. Ch. Sep. 22, 2011).

⁶² 96 F.3d 275, 278-79 (7th Cir. 1996).

Applying Chief Judge Posner’s reasoning to this case, the Court finds that, in order for Titan to recover lost profits on either its initial \$25 million investment or the subsequent \$100 million warehouse funding, Titan must present evidence sufficient to convince the Court that—absent Freedom’s bad faith—the parties would have agreed on a final financing document and would have proceeded with their deal. Here, Titan falls short.

There is no question that Freedom had a right to walk away from the deal if the loan documents and credit agreement were not acceptable to Freedom. It also appears that one of the reasons that Freedom was willing to proceed with an untraditional lending group was Middleman’s belief he would be entering into a more flexible situation with a simpler lending document. Instead, four months after the initial agreement and days before the commitment letters were due, Titan forwarded a 134-page repurchase agreement modeled after Freedom’s present banking arrangement with J.P. Morgan. When this is considered together with concerns about the commitments from LBC, commitments even Titan initially had concerns with, it is obvious that this was a deal with no momentum which probably would not have come to a final conclusion. Even under these circumstances, however, Titan is entitled to some damages to restore them to the position they would have been in but for Freedom’s breach.

Before addressing specific damages that should be awarded, the Court must emphasize that even if it found a reasonable basis to award interest on the initial \$25 million, Titan's attempt to raise the damages by over \$26 million by claiming the deal would have moved forward with commitments on the additional \$75 million is simply speculative, unfounded, and a poker bluff at best.⁶³ The facts here clearly suggest that Titan had a very difficult time obtaining the initial \$25 million in commitments. LBC only came on board days before the deadline, and Titan's alleged investor of the additional \$75 million, Brooks, was only convinced to invest \$2.5 million of the initial \$25 million. Any assertion that Titan could have raised an additional \$75 million now that the deal has failed is an assertion being made without risk or the threat of consequences. The fact that Brooks may have had the funds to make such an investment is not a sufficient basis to find that Titan could have convinced him to do so. Indeed, the facts of this case suggest Brooks was not particularly enamored with this deal: his counsel had expressed reservations about it, and even his small commitment was conditioned on his partner making a similar commitment. When there were consequences to the decision, Brooks did not like the cards being played in this game. With that

⁶³ The Court has significant doubts as to whether Titan has suffered any loss relating to the interest that would have been generated under the Agreement, as that money would have flowed to the investors and not Titan. Additionally, the Court notes that no evidence was introduced as to any claims of damages being asserted by the investors against Titan which could have been relevant to the damage claim in this litigation.

comment, the Court will now turn to the damage award that Titan is entitled to receive to restore them to the position they would have been in had the breach not occurred.

At trial, evidence was introduced that Titan's costs and expenses relating to the due diligence and preparation of the draft agreements were \$135,425.68. The Court finds this is a fair and reasonable amount for the work that was performed and will award this amount. It does, however, need to be adjusted to take into account that Freedom previously provided \$80,000 for expenses when Titan began its due diligence process.

There is also no dispute that if the contract had not been breached, Titan would have received in payment for their efforts a fee equal to 1% of the facility. The Court views this as the monetary benefit that Titan would have received from finalizing the deal. Since Freedom's breach never allowed them to get to that point, the Court finds it reasonable to award this fee. But this fee, which is \$250,000, also needs to be adjusted to take into account the sharing agreement that Titan had with LBC. As such, that fee will be reduced by \$100,000.

In sum, the Court finds in favor of Titan and awards damages in the amount of \$205,425.68.

VIII. Conclusion

This was a dispute between a desperate mortgage broker looking for financing and a group of entrepreneurs looking to make money in an industry they were foreign to. Although sophisticated investors, Titan's knowledge of this unique investment was extremely limited, and their lack of experience in the mortgage banking world led to critical mistakes and misunderstandings. On the other hand, Freedom's conduct could be characterized, at best, as loose, manipulative, and salesman-like. The participants in this deal were decent people. Unfortunately, the poker game they were playing was being played with different cards and different rules.

As a result, instead of making clear and appropriate legal decisions, the parties made rash business decisions that they are now attempting to legally justify. No party here wore a white hat, and but for greed and egos, this matter would have been resolved long ago. It is unfortunate when common sense and good judgment are abandoned for the sake of a blind victory where everybody loses. It will not surprise the Court if neither side is particularly pleased with this decision. But it is time for the parties to lay down their cards and walk away from the table.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.